

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

ROBERT J. O'MALLEY,

Charging Party,

v.

AMERICAN ARBITRATION ASSOCIATION,

Respondent.

Case No. SA-CO-21-H

PERB Decision No. 1573-H

December 30, 2003

Appearance: Robert J. O'Malley, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Robert J. O'Malley (O'Malley) of a Board agent's dismissal (attached). The unfair practice charge alleged that the American Arbitration Association (AAA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by conducting an unfair and irregular agency fee hearing process. O'Malley alleged that this conduct constituted a violation of HEERA section 3583.5 and PERB Regulations 32994(b)(7) and 32997.²

Upon review of the entire record, including the unfair practice charge, amended charge, warning and dismissal letters, and O'Malley's appeal, the Board adopts the Board agent's dismissal as a decision of the Board itself.

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

DISCUSSION

In his charge as amended, O'Malley alleges the unfairness and bias of the AAA arbitrator in conducting an agency fee appeal hearing. However, to reach the merits of O'Malley's charge, the AAA must be a covered entity under HEERA, otherwise, the Board lacks jurisdiction to adjudicate the charge. As stated by the Board agent, the AAA is neither an employer nor an employee organization under HEERA under sections 3562(f)(1) and (2) and 3562(g).³ Instead, AAA is one of three entities authorized by PERB Regulation 32994(b)(4) to select an impartial decisionmaker to hear agency fee appeals.⁴ Under that provision, the selection among those entities shall be made by the exclusive representative, in this case, the California Nurses Association (CNA). The selection and payment of the AAA by CNA

³HEERA section 3562(f) provides, in pertinent part:

(f)(1) 'Employee organization' means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees.

(2) 'Employee organization' shall also include any person that an employee organization authorizes to act on its behalf.

HEERA section 3562(g) provides:

(g) 'Employer' or 'higher education employer' means the regents in the case of the University of California, the Directors in the case of Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

⁴PERB Regulation 32994(b)(4) provides:

(4) The impartial decisionmaker shall be selected by the Public Employment Relations Board, the American Arbitration Association, or the California State Mediation Service. The selection among these entities shall be made by the exclusive representative.

pursuant to this regulation alone does not qualify the AAA to be an agent of CNA. AAA was not hired to represent employees with higher education employers regarding terms and conditions of employment. O'Malley provided no other facts to show that the AAA is a covered entity under HEERA. Under these circumstances, the Board lacks jurisdiction to address the merits of O'Malley's charge and the charge must be dismissed.

ORDER

The unfair practice charge in Case No. SA-CO-21-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

Dismissal Letter

September 25, 2003

Robert J. O'Malley
1709 Costa Verde Street
Davis, CA 95616

Re: Robert J. O'Malley v. American Arbitration Association
Unfair Practice Charge No. SA-CO-21-H
DISMISSAL LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 3, 2003. Your charge alleges that the American Arbitration Association (AAA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by conducting an unfair and irregular agency fee arbitration hearing.

I indicated in the attached letter dated September 17, 2003, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to September 26, 2003, the charge would be dismissed.

In your amended charge, filed on September 22, 2003, you contend that AAA is covered by HEERA as an agent of CNA. The charge alleges that because CNA selected and paid the AAA to conduct the agency fee arbitration hearing, AAA is an agent of CNA. The charge further alleges that the AAA "conducted an unfair and irregular agency fee hearing process and subsequent hearing."

As discussed in the attached letter, the AAA is not an employee organization or an employer under HEERA. HEERA section 3562(f)(1) defines an "employee organization" as an organization which exists for the purpose of "dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees." An employee organization also includes any person that the employee organization authorizes to act on its behalf. (Section 3562(f)(2).)

The AAA is not an employee organization because it does not exist for the purpose of representing employees before their higher education employer. Further, the AAA is not an

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

agent of CNA because there are no facts alleged which demonstrate that CNA authorized the AAA to represent employees before the employer. Thus, the AAA is not either an employee organization or an agent of an employee organization subject to HEERA. Accordingly, the AAA is not covered by the provisions of HEERA or subject to PERB's jurisdiction. The unfair practice charge does not state a prima facie case and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Craig Martin
Eric Tuchmann

Warning Letter

September 17, 2003

Robert J. O'Malley
1709 Costa Verde Street
Davis, CA 95616

Re: Robert J. O'Malley v. American Arbitration Association
Unfair Practice Charge No. SA-CO-21-H
WARNING LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 3, 2003. Your charge alleges that the American Arbitration Association (AAA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by conducting an unfair and irregular agency fee arbitration hearing.

You are employed by the University of California as a Nurse Practitioner II at the UC Davis Medical Center. Your job classification is included in the bargaining unit which is exclusively represented by the California Nurses Association (CNA). You have elected not become a member of CNA.

In May 2002, CNA sent its annual agency fee notice to fair share fee payers. On June 6, 2002, you submitted a letter to CNA objecting to the Union's calculation of the agency fee.

On an unspecified date, AAA Case Manager Craig Martin issued a notice that the agency fee arbitration hearing was scheduled for May 22, 2003 and would be conducted by Arbitrator John Kagel. The arbitration hearing was subsequently twice rescheduled.

On July 21, 2003, CNA attorney Jane Lawhon informed you that CNA had decided not to accept agency fees from you. On or about July 21, 2003, CNA sent you a check to reimburse you for agency fees paid through June 2003.

During the August 29, 2003 arbitration hearing, the arbitrator allowed CNA to challenge your standing as an agency fee objector presumably because CNA had refunded your agency fees. You were given an opportunity to rebut CNA's challenge. The arbitrator sustained CNA's challenge and excluded you from participating in the arbitration hearing.

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The charge alleges that the arbitration hearing was unreasonably delayed, you were given misleading information in response to your questions from either Mr. Martin or Mr. Kagel, Mr. Kagel and the CNA attorney engaged in ex parte communications, and you were excluded from the arbitration hearing.

Based on the facts stated above, the charge does not state a prima facie case because the American Arbitration Association is not an employee organization or an employer covered by HEERA.

PERB Regulation 32994 requires each exclusive representative which collects agency fees to establish an agency fee appeal procedure. The procedure provides for resolution of agency fee objections by an impartial decisionmaker. Regulation 32994(b)(4) states:

The impartial decisionmaker shall be selected by the Public Employment Relations Board, the American Arbitration Association, or the California State Mediation Service. The selection among these entities shall be made by the exclusive representative.

HEERA section 3562 provides various definitions of terms used in HEERA. This provision states, in relevant part:

(f) (1) "Employee organization" means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. . . .

(2) "Employee organization" shall also include any person that an employee organization authorizes to act on its behalf. An academic senate, or other similar academic bodies, or divisions thereof, shall not be considered employee organizations for the purposes of this chapter.

(g) "Employer" or "higher education employer" means the regents in the case of the University of California, the Directors in the case of Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

The charge alleges that the AAA violated HEERA by conducting an unfair and irregular agency fee objector arbitration hearing. However, the AAA is not either an employee organization or an employer under HEERA. The AAA is not an organization which exists for the purpose of representing employees before their employers in matters involving terms and

conditions of employment. Further, there is no indication in the charge that the AAA acted as an agent of CNA for this purpose. Finally, the AAA is not a higher education employer as defined above. Accordingly, the AAA is not covered by the provisions of HEERA. Thus, this charge must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 26, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney